Supreme Court U.S.
FILED
JUL 12 2002
OFFICE OF THE CLERK

(3)

No. 01-1573

IN THE

Supreme Court of the United States

DAVID W. OAKLEY,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF OF *AMICUS CURIAE* CENTER ON FATHERS, FAMILIES, AND PUBLIC POLICY IN SUPPORT OF PETITIONER

SCOTT SUSSMAN
CENTER ON FATHERS, FAMILIES, AND PUBLIC POLICY
Attorneys for Amicus Curiae
23 North Pinckney Street
Suite 210
Madison, WI 53711
(608) 257-3148

174979

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

3rd

TABLE OF CONTENTS

Page

Table of Cited Authorities iii

Interest of Amicus Curiae 1

Summary of the Argument 1

Argument 3

I. Even If The Child Support System Worked To Help Low-income Families This Probationary Condition Will Lead To Discrimination Against The Poor 3

A. None Of The Previous Restrictions On Poor Persons' Fundamental Right To Procreate Have Gone As Far As This Trial Judge's Extraordinary Probation Condition 4

B. This Probationary Condition Is Part Of A Growing Trend To Resrict The Fundamental Rights Of The Poor 9

II. Contrary To The Wisconsin Supreme Court's Assertion, Conditioning The Right To Procreate On The Payment Of Child Support Obligations Will Not Reduce Poverty In Low-income Families Because The Child Support System Was Not Designed To Eradicate Poverty 11

Contents

Page

A. For Very Low-income Parents The True Victims Of The Child Support System Are The Children Regardless Of Whether The Noncustodial Parent Pays Child Support 12

B. The Child Support System Creates Unrealistically High Debts That Impoverished Noncustodial Parents Cannot Pay And That Create Significant Negative Consequences For The Entire Family 13

C. Contrary To The Wisconsin Supreme Court's Opinion, The Perception That If Noncustodial Parents Just Paid Their Child Support Poverty Would Be Significantly Reduced Does Not Match With The Economic Reality Of A Sizable Majority Of Noncustodial Parents 18

Conclusion 20

TABLE OF CITED AUTHORITIES

Page

Cases

Bowen v. Gilliard, 483 U.S. 587 (1987) 13

Dandridge v. Williams, 397 U.S. 471 (1970) 4-5

N.B. v. Sybinski, 724 N.E.2d 1103 (Ind. Ct. App. 2000) 4

Statutes

42 U.S.C. § 608(a)(3) (2002) 12

WIS. STAT. ANN. § 49.22(9) (West 2002) 8

WIS. STAT. ANN. § 49.46 (1) (West 2002) 8, 12

WIS. STAT. ANN. § 767.25(6) (West 2002) 15

WIS. STAT. ANN. § 767.29(1)(d) (West 2002) 15

WIS. STAT. ANN. § 767.51(3)(e) (West 2002) 12, 14

WIS. STAT. ANN. § 767.51(3)(f) (West 2002) 14

WIS. STAT. ANN. § 767.51(4)(West 2002) 14

WIS. STAT. ANN. § 767.265(1) (West 2002) 8

WIS. STAT. ANN. § 767.265(3h) (West 2002) 15

Cited Authorities

Page

Administrative Codes

WIS. ADMIN. CODE § 40.03(1) (2002) 16

WIS. ADMIN. CODE § 40.03(3) (2002) 16

Other Authorities

Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75 (Winter 2000) ... 7

Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER L. 121 (2002) 7, 10

DANIEL R. MEYER & MARIA CANCIAN, UNIVERSITY OF WISCONSIN-MADISON, W-2 CHILD SUPPORT DEMONSTRATION EVALUATION, REPORT ON NON-EXPERIMENTAL ANALYSES, 1 (Mar. 2002) 12

Darci Elaine Burrell, *The Norplant Solution: Norplant and The Control of African-American Motherhood*, 5 U.C.L.A. WOMEN'S L. J. 401 (Spring 1995) 9

David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child Support Enforcement*, 81 VA. L. REV. 2575 (Nov. 1995) 9, 20

Cited Authorities

Page

DAVID J. PATE, JR., UNIVERSITY OF WIS. – MADISON, *An Ethnographic Inquiry into the Life Experiences of African American Fathers with Children on W-2*, *in* 2 W-2 CHILD SUPPORT DEMONSTRATION EVALUATION, REPORT ON NONEXPERIMENTAL ANALYSIS, 29 (Mar. 2002) 13, 20

EARL S. JOHNSON ET AL., FATHERS' FAIR SHARE HELPING POOR MEN MANAGE CHILD SUPPORT AND FATHERHOOD, 44 (1999) 6

ELAINE SORENSEN & CHAVA ZIBMAN, URBAN INST., A LOOK AT POOR DADS WHO DON'T PAY CHILD SUPPORT 3-4 (Sept. 2000) 7, 8, 18

FRED DOOLITTLE & SUZANNE LYNN, MANPOWER DEMON. RESEARCH CORP., WORKING WITH LOW-INCOME CASES: LESSONS FOR THE CHILD SUPPORT ENFORCEMENT SYSTEM FROM PARENTS' FAIR SHARE (May 1998) 15

HARRY J. HOLZER, URBAN INST., CAREER ADVANCEMENT PROSPECTS AND STRATEGIES FOR LOW-INCOME MINORITY WORKERS, 1 (Mar. 2000) 19

Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 1, 14 (Spring 1990) 17

Cited Authorities

Page

Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123 (Jan. 1993) 17

Laura M. Friedman, *Family Cap and The Unconstitutional Conditions Doctrine: Scrutinizing a Welfare Woman's Right to Bear Children*, 56 OHIO ST. L.J. 637 (1995) 10

Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339 (1996) 10

MARK TURNER & ELAINE SORENSEN, THE URBAN INST., NONRESIDENT FATHERS AND CHILD SUPPORT MODIFICATIONS, 3 (Oct. 1998) 16

OFFICE OF INSP. GEN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., *Child Support for Children on TANF*, 13 (Feb. 2002) 17

OFFICE OF INSP. GEN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., STATE POLICIES USED TO ESTABLISH CHILD SUPPORT ORDERS FOR LOW-INCOME NON-CUSTODIAL PARENTS (July 2000) 14, 15, 16

OFFICE OF INSP. GEN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE ESTABLISHMENT OF CHILD SUPPORT ORDERS FOR LOW INCOME NON-CUSTODIAL PARENTS (July 2000) 5

Cited Authorities

Page

OFFICE OF PLANNING, RES. AND EVAL., U.S. DEP'T OF HEALTH AND HUMAN SERVS., ANN. REP. TO CONGRESS (April 2002) 12

Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519 (Fall 1996) 19

Roger Levesque, *Targeting "Deadbeat" Dads: The Problem With the Direction of Welfare Reform*, 15 HAMLINE J. PUB. L. & POL'Y 1 (1994) 19

Shannon Bettis Nakabayashi, *A "Dual System" of Family Law Revisited: Current Inequities in California's Child Support Law*, 35 U.S.F.L. REV. 593 (2001) 17

Tonya L. Brito, *The Welfarization of Family Law*, 48 KAN. L.R. 229 (2000) 10, 11

U.S. Dep't of Health and Human Servs. Poverty Guidelines 67 Fed. Reg. 6931-6933 (Feb. 2002) 9

Wisconsin Pro Se Working Group, *Meeting the Challenge of Self-represented Litigants in Wisconsin* 7 (Dec. 2000) 17

Yvette Marie Barksdale, *And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of Welfare Beneficiaries*, 14 LAW & INEQ. J.1 (Dec. 1995) 4

INTEREST OF AMICUS CURIAE

With the consent of the parties pursuant to Rule 37 of the Rules of this Court,[1] the Center on Fathers, Families, and Public Policy (CFFPP) submits this brief as amicus curiae in support of the petition for writ of certiorari. Amicus is a nationally focused public policy organization that concentrates on issues facing low-income families. The mission of CFFPP is to help create a society in which low-income parents – mothers as well as fathers – are in a position to support their children emotionally, financially, and physically. Amicus has an interest in this case because it raises a fundamental question as to the procreative rights of the poorest members of society.

SUMMARY OF THE ARGUMENT

This Wisconsin Supreme Court's decision in this case is the first to restrict a parent's fundamental right to procreate based on his or her financial situation. It is, in the words of Wisconsin Supreme Court Justice Bradley, the first case "to declare constitutional a condition that limits a probationer's right to procreate based on his financial ability to support his children." *See State v. Oakley*, 629 N.W.2d 200, 216 (Wis. 2002) (Bradley, dissenting). In the United States, 2.5 million noncustodial parents do not pay child support and are poor themselves. For these parents, this decision will enable government to restrict their fundamental right to have children.

Certiorari should be granted because the decision below is unconstitutional and, for related reasons, unwise. The application of this probationary condition encourages abortions. A woman who through misfortune or even carelessness becomes pregnant by the petitioner will necessarily

---

1. Petitioner has filed a general consent for all parties wishing to submit an amicus brief. The consent of the Respondent is being Lodged herewith. Pursuant to Rule 37.6, counsel for amicus curiae certify that no counsel for a party authored this brief in whole or part, and no person or entity other than amicus curiae, or their counsel, has made a monetary contribution to this brief's preparation or submission.

feel a substantial pressure to have an abortion, for the only other alternative sends Mr. Oakley to jail and, thereby, eliminates any chance the child's father would have the income to pay support. The probationary condition in this case is furthermore different in a critical respect from other government influences on poor persons' procreative choices. This is not a case in which the state is distributing resources in a manner that merely influences the decision whether to have a child. Instead, for very low-income noncustodial parents, the Wisconsin Supreme Court has granted judges the power to place an absolute *bar* on the right to have children. Finally, even if such a probationary condition could ever be sustained in extraordinary circumstances, the one in this case fails to provide guidance to Mr. Oakley or future noncustodial parents as to when they may at the court's discretion exercise this fundamental right.

Separately, the principal premises underlying the Wisconsin Supreme Court's decision are simply wrong. The child support system was not designed to eradicate poverty for low-income families. For these families the process of determining the amount of child support a noncustodial parent must pay is fundamentally flawed. Initial child support orders often do not reflect the parents' true ability to pay child support. Once these child support orders are set it is extremely difficult for low-income fathers to get the order modified down to a lower amount based on a change in circumstances. Both low-income custodial and noncustodial parents face many difficulties sustaining employment thus they often need such modifications. This lack of steady employment and insufficient income explains why the payment of child support by low-income noncustodial parents will not significantly reduce poverty. Even if the child support system worked appropriately for every family and the payment of child support could significantly reduce poverty, this probationary condition will negatively impact low-income families. It is indicative of a trend in the government to place limits on the fundamental right of poor persons to procreate.

Accordingly, given the importance of the liberty interest at stake, the petition for writ of certiorari should be granted.

ARGUMENT

This Court should review the extraordinary probation condition in this case, which prevents a father from having a child unless he shows that he can support that child and his current children. *See Oakley*, at 201. A bitterly divided Wisconsin Supreme Court considered this probation condition reasonable given Oakley's "ongoing victimization of his nine children" through the nonpayment of support. *See id.* This victimization, the court's opinion notes, is caused by the increased likelihood that children whose parents do not pay child support will live in poverty. *See id.* at 204.

Indeed, the impact of poverty is at the heart of the trial judge's punitive probation condition. Yet for low-income families, the child support system was not designed or created to eradicate poverty. Because of poverty low-income noncustodial parents often do not have the ability to fully comply with their child support orders. Contrary to the reasoning behind the Wisconsin Supreme Court's opinion, even if parents like Mr. Oakley were able to and did pay their child support, this payment would not significantly reduce poverty. Further this probation condition will only lead to discrimination against the poor. The United States Supreme Court should grant certiorari to review this fundamental violation of Mr. Oakley's right to procreate.

I. EVEN IF THE CHILD SUPPORT SYSTEM WORKED TO HELP LOW-INCOME FAMILIES THIS PROBATIONARY CONDITION WILL LEAD TO DISCRIMINATION AGAINST THE POOR

Even if child support could truly support the most impoverished members of our society, the decision to restrict the fundamental right to procreate will have serious negative consequences. This probationary condition is part of trend to

regulate and control low-income families' procreation rights. Yet this probationary condition is the starkest example of government interfering in so fundamental of a right. This Court should grant certiorari because this probationary condition will fundamentally alter the ability of low-income families to enjoy the same basic human freedoms as wealthy and moderate-income members of our society.

A. NONE OF THE PREVIOUS RESTRICTIONS ON POOR PERSONS' FUNDAMENTAL RIGHT TO PROCREATE HAVE GONE AS FAR AS THIS TRIAL JUDGE'S EXTRAORDINARY PROBATION CONDITION

No infringement on poor persons' fundamental right to procreate has gone as far as the condition imposed in the instant case. This probationary condition varies from other measures affecting reproductive rights in three dramatic ways. First this restriction is tied directly into the child support system instead of the welfare system. Second this restriction will have a devastating impact on low-income families. Finally, this restriction because of its indeterminate nature will lead to discrimination against the poorest members of our society.

First this infringement on the procreation rights of Mr. Oakley is not tied to the denial of government subsidies. The family cap (discussed *infra*) is one example of a law that is intended to impact procreation by the denial of benefits. While many commentators have argued it is unconstitutional, *see, e.g.*, Yvette Marie Barksdale, *And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of Welfare Beneficiaries*, 14 LAW & INEQ. J.1 (Dec. 1995), courts have generally not found the family cap unconstitutional. *See, e.g., N.B. v. Sybinski*, 724 N.E.2d 1103, 1108-1111 (Ind. Ct. App. 2000). The rationale behind these court decisions is that government has no affirmative duty to provide support to its neediest members. Therefore, government can place restrictions on these benefits. *See generally Dandridge v.*

Williams, 397 U.S. 471 (1970) (upholding state imposed restrictions, including the restriction in question of a maximum family grant on AFDC recipients).

The probationary condition placed on Mr. Oakley is different. Family law mandates that any man who is the biological father of a child must pay support for that child, regardless of the nature of the father's relationship with the child and the custodial mother, or his income, or his employment history. Further, when the custodial parent is a Temporary Assistance to Needy Families (TANF) recipient the mother's views on whether he should pay support are no longer determinative as to whether to seek support.

Moreover, the other government influences on the procreative rights of TANF recipients do not directly trample on this right as this probationary condition does on Mr. Oakley's right. The family cap statutes do not prohibit reproduction; they simply refuse to provide benefits for children born after a certain time or condition. The family planning programs and the encouragement of TANF recipients to place their children for adoption do not force TANF recipients not to have children, nor for that matter to place the child for adoption.

This probationary condition is different in that it directly forces Mr. Oakley into one of two options: either support his current and future children or do not have another child. Yet the first option, to support his children the way the judge desires for many individuals such as Mr. Oakley is, perhaps, improbable. OFFICE OF INSP. GEN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE ESTABLISHMENT OF CHILD SUPPORT ORDERS FOR LOW INCOME NON-CUSTODIAL PARENTS, 1 (July 2000). Even the judge recognized this in imposing the condition when he stated that "it would always be a struggle to support these children and in truth [he] could not reasonably be expected to fully support them." Jan. 13, 1999 Trans. at 30. The reality for many low-income fathers is that because of the instability and fluctuations of income they never will have the ability to pay the amount as ordered without a

modification. Thus, this probation condition will result in strict-liability as to the right to procreate.

This probationary condition varies from the other government influences in another significant manner, namely the impact on the woman who is the mother of the child fathered by Mr. Oakley after the condition is ordered. If Mr. Oakley impregnates another woman the consequences will be severe. As Wisconsin Justice Bradley mentioned in her dissent, this probation condition amounts to state coerced abortion, as it subjects a woman who becomes pregnant by Mr. Oakley even through inadvertence – through all precautions short of celibacy – to an impossible dilemma: send him to jail by carrying the child to term or bear a child whose father will be jailed and therefore unable to pay any child support. *See Oakley*, at 219 (Bradley, J.,dissenting) (citing *People v. Pointer*, 199 Cal. Rptr. 357 (1984)). Such a scheme creates an intolerable burden on the rights of the mother and a disturbing pressure to abort.

Even if the child is not aborted, there likely will be dire consequences for the family. If the probationer does not have the ability to pay child support, he will likely be incarcerated just as his youngest son or daughter is born. If he is incarcerated there will be no hope for him to actually support this new baby. The state will have taken away a potential breadwinner, punishing the child. In addition, this will likely prevent him from being involved in this child's life. Contrary to many stereotypes, growing evidence indicates that many low-income noncustodial parents are actively involved in their children's lives. *See* EARL S. JOHNSON ET AL., FATHERS' FAIR SHARE HELPING POOR MEN MANAGE CHILD SUPPORT AND FATHERHOOD, 44 (1999). Often, even when not able to pay child support providing emotional support to their children. *See id.* This probationary condition was placed on Mr. Oakley because of his alleged victimization of his present and future children through not paying child support. In the end

this probationary condition may victimize the custodial parents and children far more than anything Mr. Oakley does.

Finally, this probationary condition is different in that the other policies limiting the right to procreate are enshrined in legislative classifications. For instance, family cap policies have specific guidelines for TANF recipients to follow. This gives the TANF recipient the ability to know what procreative conduct government will not financially support. The family cap policies were also developed through the legislative process, which enables various policy perspectives to inform the legislators about whether to enact legislation.

By contrast, this probationary condition is flawed for the lack of definitive guidance in two fronts. First, future noncustodial parents charged with not paying child support will lack guidance as to whether a judge will impose this condition on them. This will allow for the idiosyncratic tendencies of each judge to determine who gets to exercise this fundamental right. *See* Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75, 77 (Winter 2000). This is problematic because "[t]here is also substantial evidence that the entire social panic about the sexual conduct of poor women and the structure of their households is thoroughly intertwined with racist beliefs about the biological and socio-cultural inferiority of African- Americans." *See* Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER L.121, 137 (2002). This will allow judges to use this probation condition in a discriminatory manner against minorities particularly since the majority of impoverished fathers not paying child support are nonwhite. *See* ELAINE SORENSEN & CHAVA ZIBMAN, URBAN INST., A LOOK AT POOR DADS WHO DON'T PAY CHILD SUPPORT 3-4 (Sept. 2000) [hereinafter POOR DADS].

Once imposed this probationary condition also lacks any definitive guidance for Mr. Oakley to follow. The order states

that Mr. Oakley must support his children plus be able to support additional children before having another. But what level of support is necessary to satisfy this probation condition? Justice Bablitch of the Wisconsin Supreme Court seems to think one level of support is necessary but despite his claims to the contrary that truly is not clear from the record. *See Oakley*, at 214 & n.1 (Bablitch, J., concurring). In fact, he highlights that the steps necessary to satisfy this probationary condition are not even clear to the Wisconsin Justices reviewing this case. *See id.* "Obviously, Justice Bradley and I differ as to the effect of the circuit court's order. Read in the context of the entire record, I conclude that if Oakley were to show the court a good faith effort to support his children, the order would be amended." *Id.* This lack of definitive guidance to satisfy the conditions of the probation order offends the procedural aspects of the Due Process Clause.

The Wisconsin legislature has already placed some limitations on what it feels is necessary for a noncustodial parent to pay to support his children even when he is behind in paying his support. In Wisconsin, the child support guidelines provide that a noncustodial parent with five or more children may only be ordered to pay thirty-four percent of his or her income towards child support. *See* WIS. STAT. ANN. § 49.22 (9) (West 2002); WIS. ADMIN. CODE § 40.03(1) (2002). In addition, the payment of current support plus any additional amount towards arrearages cannot leave the party at an income below the federal poverty line. *See* WIS. STAT. ANN. § 767.265 (1) (West 2002). The decision in this case reflects no such legislative judgment.

What happens if providing thirty-four percent of his income, which is the amount Mr. Oakley would owe under the Wisconsin child support guidelines, places him below the federal poverty level? To illustrate, if Mr. Oakley can earn six dollars per hour and works forty hours per week. He will then have a yearly income of $8,236.8, which studies show is significantly higher than most noncustodial parents have who work and do not pay child support. *See* POOR DADS, *supra*, at 4 (noting that the

average income of noncustodial parents who do not pay child support and do work is $5,570 per year). After his employer garnishes thirty-four percent of his income for current child support he will have $5436.29 per year to live on. Assuming that he lives alone, the federal poverty level for one individual in the forty-eight contiguous states is $8,860. *See* U.S. Dep't of Health and Human Servs. Poverty Guidelines 67 Fed. Reg. 6931-6933 (Feb. 2002).

B. THIS PROBATIONARY CONDITION IS PART OF A GROWING TREND TO RESRICT THE FUNDAMENTAL RIGHTS OF THE POOR

There is a general trend to become increasingly punitive to fathers who do not pay child support. Impoverished men are not subjects of our public compassion. The perceived irresponsibility of fathers takes three forms: they bring into the world "illegitimate" children they do not intend to support, they leave marriages they should remain in, and they fail to pay support. *See* David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child Support Enforcement*, 81 VA. L. REV. 2575, 2576 (Nov. 1995). This alleged "irresponsibility" is used to justify increasingly punitive measures against noncustodial parents.

One solution to the "problem" of poverty and one way to affect the allegedly "immoral" noncustodial parents is to restrict their fundamental right to procreate. Government can inappropriately justify restrictions on a poor person's right to procreate because they are different from us. Low-income families become less and less deserving of parenthood leading to further restrictions on the right to procreate. *See* Darci Elaine Burrell, *The Norplant Solution: Norplant and The Control of African-American Motherhood*, 5 U.C.L.A. WOMEN'S L. J. 401, 403-05 (Spring 1995). "[C]urrent welfare rhetoric may harbor eugenic themes and may have as its underlying message that poor women (among whom

women of color are disproportionately represented) should not and do not deserve to procreate." Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339, 368 (1996).

These societal beliefs have increasingly been enshrined in government policy. For instance, twenty-three states have a family cap policy for individuals receiving welfare. *See* Smith, *supra*, at 124. Typically, welfare cash grants have increased modestly with family size. Under the family cap policy, however, if another child is conceived after a family begins to receive welfare, the cash grant does not increase for the family when the child is born. These policies are justified under the mistaken notion that low-income families have more children to get additional welfare benefits. *See* Laura M. Friedman, *Family Cap and The Unconstitutional Conditions Doctrine: Scrutinizing a Welfare Woman's Right to Bear Children*, 56 OHIO ST. L.J. 637, 657 (1995).

Further, there is an increasing intensification of efforts to promote family planning, contraceptive use, and adoption relinquishment among welfare recipients. *See* Smith, *supra*, at 124. Sixteen states make provisions that all adult TANF recipients must participate in family planning promotion programs. *See id.* at 211. Three states encourage TANF recipients to adopt their children even though there are no allegations of child abuse or neglect. *See id.*

The child support system similarly attempts to regulate poor families' lives. It has long been recognized that there exist dual family law systems. *See* Tonya L. Brito, *The Welfarization of Family Law*, 48 KAN. L.R. 229, 229 (2000) (citing Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 17 STAN. L. REV. 614, passim (1965)). Two distinct bodies of family law exist in the United States. *See id.* One system is for the majority of individuals and another system is for poor families and families who receive public assistance. *See id.* The latter system involves

privacy-invading cost-conscious welfare regulations designed to regulate family life. *See id.*

There is no similar invasion of the right to procreate or regulate family life among middle- and upper-income families. "Although welfare reform measures actively discourage women receiving welfare from having additional children (even if the woman has only one child), women in the general population face no such restrictions regardless of the number of children they have." *Id.* at 243. Only when a woman receives public assistance does government try to influence the decision to have a child. *See id.* Given society's trend to limit the procreative rights of its poorest members it is not surprising that the Wisconsin Supreme Court used the prevention of poverty to justify the ability of government to trample on the fundamental right of the poorest members of society to procreate.

II. CONTRARY TO THE WISCONSIN SUPREME COURT'S ASSERTION, CONDITIONING THE RIGHT TO PROCREATE ON THE PAYMENT OF CHILD SUPPORT OBLIGATIONS WILL NOT REDUCE POVERTY IN LOW-INCOME FAMILIES BECAUSE THE CHILD SUPPORT SYSTEM WAS NOT DESIGNED TO ERADICATE POVERTY

Mr. Oakley's situation exemplifies the problem created by the trial judge's punitive probation condition. The logic behind the probation condition was that it would "protect the victims of Oakley's crimes – Oakley's nine children." *See Oakley*, at 207. The Wisconsin Supreme Court emphasized also that the "payment of child support benefits poverty-stricken children the most." *Id.*, at 204. Yet this statement is only true if low-income noncustodial parents have the money to pay their child support orders. The reality is that for low-income noncustodial parents the child support debts they obtain are beyond their ability to pay. Even if they could and did pay child support, low-income families would still be in poverty.

A. FOR VERY LOW-INCOME PARENTS THE TRUE VICTIMS OF THE CHILD SUPPORT SYSTEM ARE THE CHILDREN REGARDLESS OF WHETHER THE NONCUSTODIAL PARENT PAYS CHILD SUPPORT

For welfare recipients the aim of the child support system is primarily cost recovery for the government and not the reduction of poverty. A pregnant woman who meets certain income thresholds can receive Medicaid to cover the cost of her pregnancy. *See* WIS. STAT. ANN. § 49.46(1) (West 2002). The state may then seek reimbursement from the father for the cost of the pregnancy and this cost is added onto his child support bill. *See* WIS. STAT. ANN. § 767.51(3)(e) (West 2002).

In most states, the charging of birth expenses to recoup Medicaid expenses starts a long process of the child support system depriving poor families of their child support. When families apply for TANF, federal law requires the families to assign their right to child support to the State. *See* 42 U.S.C. § 608(a)(3) (2002). The State may then pass through this money to the family or keep it. In fiscal year 2000, the latest year for which there is collected data, the government kept 85% ($1,354,080,032) of child support collected for TANF recipients. *See* 4 OFFICE OF PLANNING, RES. AND EVAL., U.S. DEP'T OF HEALTH AND HUMAN SERVS., ANN. REP. TO CONGRESS (April 2002). Studies have shown that noncustodial parents pay more child support when a state fully passes-through the child support to mothers receiving TANF. *See, e.g.*, DANIEL R. MEYER & MARIA CANCIAN, UNIVERSITY OF WIS.-MADISON, W-2 CHILD SUPPORT DEMONSTRATION EVALUATION, REPORT ON NONEXPERIMENTAL ANALYSES, 1, 5 (Mar. 2002).

The federal government granted Wisconsin, the state in which petitioner lives, a waiver to give all child support to most families on TANF and not factor this support in determinations of eligibility for government assistance programs. *See id.* at 1,

fn. 1. Wisconsin is the only state that has this policy. Yet even in Wisconsin for many low-income families, the "benefits of the pass-through policy are undermined by the amount of debt that men owe [to the government] from previous AFDC arrears." DAVID J. PATE, JR., UNIVERSITY OF WIS. - MADISON, *An Ethnographic Inquiry into the Life Experiences of African American Fathers with Children on W-2*, *in* 2 W-2 CHILD SUPPORT DEMONSTRATION EVALUATION, REPORT ON NONEXPERIMENTAL ANALYSIS, 29, 81 (Mar. 2002).

Because of this cost recovery focus, portions of Mr. Oakley's child support bill are not owed to the mothers of his children but to the government. In Mr. Oakley's situation if you removed all debt that he owed to the state he would have paid over seventy percent of his child support order. *See* Petitioner's Motion for Reconsideration at app. A. Thus, in most cases where the custodial parent is a TANF recipient the cost recovery goal of the child support system makes the children the "victims" whether or not the non-custodial parent pays child support. *See Bowen v. Gilliard*, 483 U.S. 587, 596 (1987) (noting that families will suffer because of the government's decision to not pass-through the child support to AFDC recipients).

B. THE CHILD SUPPORT SYSTEM CREATES UNREALISTICALLY HIGH DEBTS THAT IMPOVERISHED NONCUSTODIAL PARENTS CANNOT PAY AND THAT CREATE SIGNIFICANT NEGATIVE CONSEQUENCES FOR THE ENTIRE FAMILY

The process to determine the amount of child support owed results in orders that low-income noncustodial parents could never pay. First, the child support system charges many fees against noncustodial parents. In addition, the amount of the initial child support order does not correspond with the ability of the parent to pay support. Further the granting of modifications of child support orders for low-income families also fail to reflect noncustodial parents' ability to pay child

support. While the Wisconsin Supreme Court opinion fails to acknowledge this, the resulting child support debts are beyond most low-income noncustodial parents' ability to ever pay.

Throughout the nation and Wisconsin a low-income noncustodial parent faces many charges besides his payment of current child support. Forty-six states charge noncustodial parents for welfare paid before the establishment of paternity. *See* OFFICE OF INSP. GEN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., STATE POLICIES USED TO ESTABLISH CHILD SUPPORT ORDERS FOR LOW-INCOME NON-CUSTODIAL PARENTS, 2 (July 2000) [hereinafter STATE POLICIES]. Since May 2000 Wisconsin prohibits the charging of retroactive child support. *See* WIS. STAT. ANN. § 767.51(4) (West 2002) ("liability for past support of the child shall be limited to support for the period after the day on which the petition . . . is filed"). Yet Mr. Oakley faced these potential fees when paternity was established for his children. *See* WIS. STAT. ANN. § 767.51(4) (West 1998) ("The father's liability for past support of the child shall be limited to support for the period after the birth of the child.").

At the establishment of paternity, additional fees may be charged to the noncustodial parent besides retroactive support. Some states, including Wisconsin, charge fathers to reimburse the government for expenses paid by Medicaid associated with the birth of the baby. *See* STATE POLICIES, *supra*, at 2; WIS. STAT. ANN. § 767.51(3)(e) (West 2002) (providing authority to charge these fees). Most states, including Wisconsin, also seek reimbursement from a father for the cost of a genetic test, if the test is part of the paternity hearing. *See* STATE POLICIES, *supra*, at 2; WIS. STAT. ANN. § 767.51(3)(f) (West 2002). The child support system has charged Mr. Oakley over $11,000 in such fees that will never tangibly benefit any of his children. *See* Petitioner's Motion for Reconsideration at App. A.

In addition to these front-end arrears, states charge noncustodial parents other ongoing fees and interest on unpaid support. Forty-six states, including Wisconsin, allow employers to charge fees to noncustodial parents for income withholding. *See* STATE POLICIES, *supra*, at 2; WIS. STAT. ANN. § 767.265(3h)(West 2002). The state child support agency charges noncustodial parents other fees. *See* STATE POLICIES, *supra*, at 2; WIS. STAT. ANN. § 767.29(1)(d) (providing for thirty-five dollar annual fee). In thirty-four states, interest charges on unpaid support can add significant amounts to a noncustodial parent's child support bill. *See* STATE POLICIES, *supra*, at 2. Wisconsin charges twelve percent annual interest on any unpaid child support. *See* WIS. STAT. ANN. § 767.25(6) (West 2002). Until May 2000, Mr. Oakley was charged eighteen percent annual interest on any unpaid child support. *See* WIS. STAT. ANN. § 767.25(6) (1998).

Besides these additional fees, for most low-income noncustodial parents their actual child support order will be beyond their ability to pay:

> [S]tate guidelines that fix awards based on a proportion of income assume a steady income over time, punctuated at most by only brief periods of unemployment. But periodic unemployment may be an unavoidable fact of life for many low-income NCPs [noncustodial parents], especially if they are men of color facing job discrimination in inner cities with weak job markets. For them, imputing steady earnings — even at a low wage — can dramatically overstate their "potential income."

FRED DOOLITTLE & SUZANNE LYNN, MANPOWER DEMON. RESEARCH CORP., WORKING WITH LOW-INCOME CASES: LESSONS FOR THE CHILD SUPPORT ENFORCEMENT SYSTEM FROM PARENTS' FAIR SHARE (May 1998). Forty-eight states, including Wisconsin, nonetheless impute income to noncustodial parents.

See STATE POLICIES *supra*, at 15; WIS. ADMIN. CODE § 40.03(3) (2002).

If the child support order was inappropriately set from the beginning or the noncustodial parent's income fluctuates downward, the child support obligor should be able to modify it downward to reflect his true ability to pay. For low-income obligors a decrease in income is unlikely to cause a change in the order:

> 70 percent of the AFDC cases reviewed, although eligible, were not modified by the CSE [child-support enforcement] agency because of earnings of the obligor, typically a nonresident father, had fallen, warranting a lower payment. The CSE staff typically dropped these cases rather than pursue lowered payments. In contrast, only 15 percent of cases not receiving Aid to Families with Dependent Children (AFDC) were dropped for similar reasons.

MARK TURNER & ELAINE SORENSEN, THE URBAN INST., NONRESIDENT FATHERS AND CHILD SUPPORT MODIFICATIONS, 3 (Oct. 1998) (citing KATHLEEN KOST, ET AL., *Revising Child Support Orders: The Wisconsin Experience*, 45 FAM. RELS. (Jan. 1996)). An increase in a nonresident father's income is more likely to result in an increase in child support than is an equivalent decrease in income likely to result in a lowered payment. *See id.* at 2.

In fact, demographic characteristics of the obligor impact the likelihood of a downward modification more than a change in that parent's economic situation. All else being equal, white noncustodial parents are far more likely than nonwhite noncustodial parents to receive a downward modification of their child support order. *See id.* at 19. In addition, fathers who were never married to the mother of their children are less likely to receive a reduction in child support then fathers who were married to the mother of their children. *See id.* at 16.

These problems with the child support system are compounded because many family law litigants do not have a lawyer to argue for a realistic child support order. In some Wisconsin counties, litigants represent themselves in as many as seventy percent of family law cases. *See* Wisconsin Pro Se Working Group, *Meeting the Challenge of Self-represented Litigants in Wisconsin* 7 (Dec. 2000). This trend is not unique to Wisconsin. "[S]everal states have performed 'legal needs' studies which demonstrated that **large segments of low and middle income families are effectively denied access to the courts** to resolve child custody, **support**, and related domestic problems." Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123, 123 (Jan. 1993) (emphasis added).

This leads to child support orders that violate federal laws. For non-custodial parents with earnings below the federal poverty level total child support orders were sixty-nine percent of their total earnings in 1996. *See* OFFICE OF INSP. GEN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., *Child Support for Children on TANF*, 13 (Feb. 2002). However, federal law prohibits garnishing over 50 to 65 percent of any individual's paycheck depending on the amount of arrears and whether he supports another family. *See id.* (citing 15 U.S.C.A. § 1673(b)(2) (West 2002)).

In addition to consistently violating federal law, these unrealistically high orders create debts that impoverished noncustodial parents never realistically have the ability to pay. *See* Shannon Bettis Nakabayashi, *A "Dual System" of Family Law Revisited: Current Inequities in California's Child Support Law*, 35 U.S.F.L. REV. 593, 613 (2001). Fathers making as little as minimum wage can end up owing tens of thousand of dollars. *See* Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 1, 14 (Spring 1990). Thus, conditioning the right to procreate on the payment of child support is unlikely to make low-income fathers suddenly have money to pay these high debts.

C. CONTRARY TO THE WISCONSIN SUPREME COURT'S OPINION, THE PERCEPTION THAT IF NONCUSTODIAL PARENTS JUST PAID THEIR CHILD SUPPORT POVERTY WOULD BE SIGNIFICANTLY REDUCED DOES NOT MATCH WITH THE ECONOMIC REALITY OF A SIZABLE MAJORITY OF NONCUSTODIAL PARENTS

Most individuals believe that fathers who do not pay child support are "deadbeat" dads. *See Oakley*, at 203. The failure of these deadbeat dads to pay child support is believed to cause poverty among children. The Wisconsin Supreme Court emphasized that "inadequate child support is a direct contributor to childhood poverty." *See Oakley*, at 204. However, that statement is valid only to the extent that the money exists, but remains unpaid.

The Wisconsin Supreme Court's statement fails to recognize the overall economic reality of men faced with poverty themselves. Custodial mothers who are poor and do not receive child support have similar demographic characteristics to poor nonresident fathers who do not pay formal child support. *See* POOR DADS, *supra*, at 4. They both have similar education levels. *See id.* More than forty percent of low-income fathers who do not pay support have not finished high school. *See id.* In fact, only two percent of low-income fathers who do not pay child support have a college degree. *See id.*

Both parents are likely to be unemployed. *See id.* In fact, only thirty-one percent of poor fathers who do not pay child support reported that they were working. *See id.* Of those who do work the average income is only $5,570 per year, comparable to an annual average income of $5,276 for poor custodial parents who do not receive child support. *See id.* at 5.

Social scientists have determined that many low-income individuals truly are not able to sustain employment. The literature identifies many personal barriers for individuals to get employment. These include health limitations, limited education, limited work experience, lack of English skills,

transportation barriers, lack of access to phones, and shelter instability. *See id.* at 5 (citing Zedlewski 1999). Further, the prospect for Mr. Oakley to find a job will diminish greatly because of his incarceration. "Even after they leave prison, work prospects for ex-offenders do not improve that much since their criminal records and interrupted labor force participation make them unattractive to prospective employers." *Id.* at 4.

In addition, there exist many societal barriers to employment. First, low-income fathers have few employment services to help them find a job. *See id.* at 13-14. Second racism is another significant societal barrier to employment prospects of many low-income noncustodial parents. The majority of individuals who are poor and do not pay child support are minorities. *See id.* at 3-4 (noting that the majority of fathers who do not pay child support and are poor are nonwhite). Race and class prejudices are significant barriers to employment. *See* Pate, *supra*, at 78. "But, even when compared to whites with comparable levels of education and residing in comparable regions, African-Americans and other minorities earn lower wages and have lower employment rates." *See* HARRY J. HOLZER, URBAN INST., CAREER ADVANCEMENT PROSPECTS AND STRATEGIES FOR LOW-INCOME MINORITY WORKERS, 1 (Mar. 2000).

Low-income fathers' income is so meager that even if support orders were established and enforced for every child with a living but absent parent, the TANF caseload would only be reduced eleven percent. *See* Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 562 (Fall 1996). Sixty-six percent of custodial mothers with support orders who were not receiving support cited the father's economic inability to pay as the main reason for the nonpayment. *See* Roger Levesque, *Targeting "Deadbeat" Dads: The Problem With the Direction of Welfare Reform*, 15 HAMLINE J. PUB. L. & POL'Y 1, 32 (1994). A 1995 Census Bureau report estimated that if all child support orders had been fully enforced, the proportion of families

living in poverty would have not changed significantly. *See* Chambers, *supra*, at 2594 (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CHILD SUPPORT FOR CUSTODIAL MOTHERS AND FATHERS: 1991, 9 (1995)).

Thus, the perception that noncustodial parents, such as Mr. Oakley, cause poverty among low-income families and that they are comparatively economically better off does not match with reality. This perception was at the heart of both of the trial judge's order and the Wisconsin Supreme Court upholding that order. *See Oakley*, at 203-05. Instead, most low-income fathers are in similar economic circumstances to the low-income mothers and children whom they are ordered to support. The rhetoric that portrays these fathers as the cause of poverty fails to recognize their economic circumstances. It also fails to recognize the many problems the child support system has in dealing with low-income families. *See* Pate, *supra*, at 80.

* * * *

This Court should grant review of this case because it touches on one of the most fundamental rights of humans. The problems with the child support system create child support debts that many noncustodial parents will never have the ability to pay. The subsequent loss of such a fundamental right for the poorest members of our society grants government too much control over such an intimate decision.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for a writ of certiori, the petition should be granted.

Respectfully submitted,

SCOTT SUSSMAN
CENTER ON FATHERS, FAMILIES,
AND PUBLIC POLICY
Attorneys for Amicus Curiae
23 North Pinckney Street
Suite 210
Madison, WI 53711
(608) 257-3148